Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1597

CANAL KEYHEA,
Appellant,

vs.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.,
Appellees.

On Appeal From the Court of Appeal for the State of California, First Appellate District

JURISDICTIONAL STATEMENT

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No.

CANAL KEYHEA,
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Appellees.

On Appeal From the Court of Appeal for the State of California, First Appellate District

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JURISDICTIONAL STATEMENT

Canal Keyhea, appellant, appeals from the judgment of the Court of Appeal of California, First Appellate District, affirming the dismissal of appellant's complaint brought pursuant to 42 U.S.C. § 1983. The complaint challenged the constitutional validity of California statutes authorizing the involuntary transfer of state prisoners to state mental insti-

tutions and named appellee Enomoto as a defendant.[1] Appellant submits this jurisdictional statement to demonstrate that the court has jurisdiction of this appeal, that substantial questions are presented, and that summary reversal is appropriate under *Vitek v. Jones,* ..... U.S. ....., 48 L.W. 4317 (March 25, 1980) and *Sibron v. New York,* 392 U.S. 40 (1968).

OPINIONS BELOW

All the opinions below are unreported. The opinion of the Court of Appeal is reproduced as Appendix A and the order of that court correcting factual errors in its opinion and denying a rehearing is reproduced as Appendix B. The order of the California Supreme Court denying appellant's petition for a hearing is reproduced as Appendix D. The order of the Solano County Superior Court sustaining appellees' demurrer to appellant's complaint and that court's subsequent judgment is reproduced as Appendix C.

JURISDICTION

This is an action brought under 42 U.S.C. § 1983 in a California state court. The judgment of the California Court of Appeal, First Appellate District, was entered on March 4, 1980, affirming the trial court's judgment of dismissal on November 27, 1978, of appellant's complaint. The Court of Appeal modified its opinion and denied appellant's timely petition for rehearing on January 18, 1980. On February 27, 1980, the Supreme Court of California denied appellant's petition for hearing. The jurisdiction of the Court to review the judgment by appeal is conferred by 28 U.S.C. § 1257(2), and the following cases sustain that jurisdiction: *Lawrence v. State Tax Commission,* 286 U.S. 276, 281-283 (1932); *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 525 (1959).

[1] In addition to appellee Enomoto, the appellees herein are Jerome Lackner, Director of California Department of Health, Howard Way, Chairman of the California Community Release Board, and T. L. Clannon, Superintendent of the California Medical Facility.

STATUTORY PROVISIONS INVOLVED

The action challenges California Penal Code §§ 2684 and 2685, which are set forth below:

> If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Board of Prison Terms for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the director of the appropriate department so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in the state hospital.
>
> California Penal Code § 2684

> Upon the receipt of a prisoner, as herein provided, the superintendent of the state hospital shall notify the Director of Corrections of that fact, giving his name,

> the date, the prison from which he was received, and from whose hands he was received. When in the opinion of the superintendent the mentally ill, mentally deficient or insane prisoner has been treated to such an extent that such person will not benefit by further care and treatment in the state hospital, the superintendent shall immediately notify the Director of Corrections of that fact. The Director of Corrections shall immediately send for, take and receive the prisoner back into prison. The time passed at the state hospital shall count as part of the prisoner's sentence.
>
> California Penal Code § 2685

California Penal Code § 4011.6 and California Welfare and Institutions Code § 5352.5 are involved in this case but due to their length are reproduced as Appendix F.

QUESTIONS PRESENTED

1. Whether a prisoner's complaint challenging his forced drugging and commitment to a mental institution may be dismissed on the pleadings as moot due to the prisoner's discharge when the complaint alleges that continuing legal disabilities will be imposed as a result of the commitment and forced drugging.

2. Whether California Penal Code §§ 2684 and 2685, which authorize the involuntary transfer of California state prisoners from state prisons to mental institutions without certain procedural protections, including an adversary hearing and provision of counsel, violate the Due Process Clause of the Fourteenth Amendment.

3. Whether California Penal Code §§ 2684 and 2685, which authorize the summary placement of California state

prisoners in mental institutions pursuant to procedures and standards significantly different from those applied in the placement of all other classes of individuals, violate the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This action, which was brought under 42 U.S.C. § 1983 in a state court, challenges the validity of California Penal Code §§ 2684 and 2685 which authorize the summary transfer of state prisoners to mental institutions. The trial court sustained appellees' demurrer on the ground, among others, that the complaint did not state sufficient facts to constitute a cause of action under 42 U.S.C. § 1983 (App. C., p. 4). The California Court of Appeal affirmed the trial court's judgment on the ground that appellant's discharge from parole had rendered the case moot (App. A, pp. 13-15).

A. Proceedings in the Trial Court

In July of 1977, appellant, a California state prisoner who was then confined at Patton State Hospital ("Patton"), filed a class action complaint under 42 U.S.C. § 1983 challenging the constitutional validity of California Penal Code §§ 2684 and 2685. The complaint also challenged, on constitutional and California statutory grounds, regulations of the California Department of Corrections allowing the forced medication of prisoners. Appellant does not seek review of the merits of the forced medication claim by this Court. In November of 1977, an amended complaint was filed which added two California taxpayers as plaintiffs but the taxpayers solely challenged the forced medication regulations. The amended complaint alleged that appellant

had been incarcerated in a state prison operated by the California Department of Corrections until February of 1977. At that time appellant was transferred pursuant to California Penal Code § 2684 to Patton, a state hospital for mentally disordered individuals operated by the California Department of Health. Pursuant to § 2684 appellant and other California prisoners were not afforded written notice, a hearing, the right to call and present evidence, and other procedural protections prior to their transfer (CT 48:19-49:2). It was further alleged that the records of appellant's transfer to a mental institution and his forced drugging would have a continuing harmful effect on, *inter alia,* appellant's ability to obtain government and other types of employment (see allegations quoted in margin below).[2] The amended complaint prayed for, *inter alia,* injunctive relief restraining the enforcement of §§ 2684 and 2685, a declaratory judgment that §§ 2684 and 2685 and the forced medication regulations and appellees' actions under those provisions were unconstitutional and void, and an order requiring expunction of references to appellant's transfer and forced medication from his records (CT 52:4-7; 52:9-12; 53:5-14; 209:28-210:2).

Appellees filed a demurrer in January of 1978, an amendment to the complaint was filed in March of that year, and

[2]It was alleged that the forced medication actions and references in appellant's records "will have an adverse effect on the ability of [appellant] . . . to obtain employment with, among other agencies, the Department" (CT 208:7-12) and that:

> The summary transfers of [appellant] and his class—based upon a finding that they are mentally ill, mentally deficient or insane—are duly noted in their permanent records which form the basis for future classification and parole and certain employment decisions. The negative implications of the transfer actions will have a continuing harmful effect upon their status both in prison and on parole (CT 47:9-18; 209:7).

appellant was released on parole from Patton in May of 1978. In October of 1978 the trial court sustained the demurrer to appellant's and the taxpayers' complaint. The trial court sustained the demurrer as to the claims raised by appellant on the ground that the complaint did not state sufficient facts to constitute a cause of action under 42 U.S.C. § 1983 and, apparently as to appellant's claims based upon state law, that appellant had not exhausted his administrative remedies (App. C, p. 4).[3] A judgment of dismissal was subsequently entered (App. C, pp. 1-2).

B. The Decision Below

In July of 1979, shortly before oral argument in the Court of Appeal, appellant was returned to state prison pursuant to a provision allowing the return of a parolee for a 90-day psychiatric observation. In November of 1979 appellant was discharged from parole and in December of 1979 the Court of Appeal rendered its decision. The court stated the standard it was applying to measure the pleadings was whether the "allegations state, or can be amended to state, a cause of action" (App. A, p. 3, n.1). The court first held that there was no necessity to exhaust administrative remedies but noted that prior to its decision appellant had been discharged from parole rendering the matter moot (App. A, pp. 8-11, 13-15). It found the matter moot because appellant was no longer subject to the challenged provisions, the possibility of future commitments of appellant was speculative, and due to the absence of a justiciable controversy the court was "unable to ren-

[3]In their demurrer appellees did *not* argue that the alleged failure to exhaust administrative remedies barred appellant's claims under 42 U.S.C. § 1983 (CT 81-92; 98-104).

der an effective decree responsive to appellant's complaint" (App. A, pp. 14-15). Appellant had extensively argued that his allegations of continuing harm from the records of his commitment and forced medication rendered the matter not moot (see § C, *infra*). The Court of Appeal did not address this point in its opinion. A timely petition for rehearing was denied by the Court of Appeal after which the California Supreme Court denied a petition for hearing.

C. Stage at Which the Federal Questions Were Raised

In appellant's complaint and memorandum filed in the trial court appellant raised the claim that §§ 2684 and 2685 violated the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution (CT 49:16-50:2; 52:9-12; 159-177). The trial court rejected these claims on the merits. The above claims were reiterated by appellant in his briefs, as well as the *amicus* brief of the State Public Defender, before the California Court of Appeal and the California Supreme Court. See, *e.g.*, Appellant's Opening Brief, 16-38. The Court of Appeal stated it would not reach the above constitutional claims because it found the case moot. (App. A, p. 13). The California Supreme Court denied a hearing without an opinion (App. D).

Similarly in his memorandum filed in the trial court and briefs filed in the Court of Appeal and California Supreme Court, appellant extensively argued that the continuing injury from his records of commitment and forced medication rendered the action not moot under federal law. See, *e.g.*, CT 202-203; CT 223-225; Appellant's Opening Brief, 75; Closing Brief, 11-14; Petition for Rehearing, 4-7; Petition for Hearing, 7, 11-17. The trial court did not reach the mootness issue. The Court of Appeal did not address the contention that the action was not moot due to the continuing injury to appellant.

THE QUESTIONS ARE SUBSTANTIAL

1. Application of the Sibron-Carafas[4] Principle Demonstrates the Action Is Not Moot

Two points should be noted with respect to the state court's holding that this action was moot. First, that holding is not binding here because "the question of mootness is itself a question of federal law upon which [this court] must pronounce final judgment." *Liner v. Jafco, Inc.*, 375 U.S. 301, 304 (1964) (reversing state court holding of mootness and reaching merits); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 525 (1959) (reversing state court holding of lack of standing and reaching merits). See also discussion in *Lawrence v. State Tax Commission*, 286 U.S. 276, 282 (1932).

Second, the holding was indisputably incorrect under federal law. The controlling principle is clear: "a criminal case is moot *only* if it is *shown* that there is *no possibility* that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57 (1968) (emphasis added); *Carafas v. LaVallee*, 391 U.S. 234, 236-238 (1968). While this court has not specifically applied the *Sibron-Carafas* principle to civil litigation, each of the eight circuits to consider the issue has done so in cases involving the adverse effect from records

[4]*Sibron v. New York*, 392 U.S. 40 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968).

of prison transfers, prison disciplinary proceedings, student suspensions, mental hospital commitments, and denial of conscientious objector status.[5] Indeed the Ninth Circuit has consistently reversed district court dismissals based on mootness in situations virtually identical to that at issue

[5]See, *e.g.*, *Justin v. Jacobs*, 449 F.2d 1017, 1019-1020 (D.C. Cir. 1971) (challenge to civil commitment not mooted by release); *Winnick v. Manning*, 460 F.2d 545, 548 n.3 (2nd Cir. 1972) (challenge to student suspension not mooted by readmission); *Benfield v. Bounds*, 540 F.2d 670, 672-673 (4th Cir. 1976) vacated on merits *sub nom Jones v. Carroll*, 429 U.S. 1033 (1977) (challenge to prison transfer not mooted by return of prisoner to original institution; *West v. Cunningham*, 456 F.2d 1264, 1265 (4th Cir. 1972) (challenge to segregated confinement procedures not mooted by release from confinement); *McAliley v. Birdsong*, 451 F.2d 1244, 1245-1246 (6th Cir. 1971) (challenge to draft board's denial of conscientious objector status not mooted by undesirable discharge from Army because record of such a discharge "can seriously jeopardize an individual's prospects for future employment as well as his general reputation."); *Hahn v. Burke*, 430 F.2d 100, 102-103 (7th Cir. 1970) (challenge to probation revocation not mooted by release of probationer); *Chapman v. Pickett*, 586 F.2d 22, 26-27 (7th Cir. 1979); *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1079 n.1 (8th Cir. 1969) (challenge to student suspension not mooted when students no longer in school and expiration date of suspension had passed); *Hatter v. Los Angeles City High School District*, 452 F.2d 673, 674 (9th Cir. 1971) (challenge to student suspensions not mooted by graduation of students); *Black v. Warden of United States Penitentiary*, 467 F.2d 202, 204 (10th Cir. 1972) (challenge to segregated confinement not mooted by prisoner's transfer from federal to California prison). See also *E.J. v. State*, 471 P.2d 367, 369-370 (Alaska Supreme Court 1970) (release of juvenile does not render action moot because it is "possible that . . . juvenile record could be made available to . . . prospective employers."); *Matter of Stephenson*, 344 N.E.2d 679, 680-681 (Ill. App.Ct. 1976) (absolute discharge of person challenging civil commitment does not render matter moot because he might be called upon to disclose commitment on employment application or during job interview); *State v. Van Tassel*, 484 P.2d 1117, 1119-1122 (Oregon Ct. of Appeals 1971) (similar analysis to *Stephenson, supra*).

here.[6] And in an opinion by Justice Blackmun the Eighth Circuit specifically applied *Carafas* and *Sibron* in holding a challenge to student suspensions was not mooted when the students were no longer in school and the expiration date of the suspension had passed. *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1079, n.1 (8th Cir. 1969).

Sibron and *Carafas* should be controlling on the mootness issue but this case is stronger in some respects. Under *Carafas* and *Sibron* the court assumes the existence of adverse collateral consequences. This action arises after the sustaining of a demurrer and the allegations of the complaint establish the existence of adverse legal consequences. Moreover, these consequences are both tangible and remediable. Thus, one ready example of the tangible injury caused by appellant's commitment is illustrated by a provision of the Administrative Manual of the California Department of Corrections, which provides that "[a]ny history of confinement for mental illness in an institution or sanitarium is cause for permanent rejection" from employment (Administrative Manual § 6034(a)). Compare *Ginsberg v. New York*, 390 U.S. 629, 633, n.2 (1968) (provision providing for discretionary revocation of license to operate luncheonette business for conviction of any crime); *Street v. New*

[6]See, *e.g.*, *Hatter v. Los Angeles City High School District*, 452 F.2d 673, 674 (9th Cir. 1971); *Wilson v. Webster*, 467 F.2d 1282, 1283-1284 (9th Cir. 1972).

York, 394 U.S. 576, 579, n.3 (1969). And, strikingly similar to the use of prior convictions to impeach credibility, it has been recognized that "records of commitments to a mental institution will certainly be used in any subsequent proceedings for civil commitment" (*In re Ballay,* 482 F.2d 648, 652 (D.C. Cir. 1973) (Wright, J.)). See *Conservatorship of Buchanan,* 78 Cal.App.3d 281, 289, n.6 (1978) (approving use of such records in California courts).

Appellant recognizes that summary reversal of state court decisions is not favored. However, the collateral consequences mootness issue was extensively briefed in the courts below and the Court of Appeal was made aware of the numerous federal decisions which directly support the contention made by appellant here. The Court of Appeal's inexplicable refusal to even address this issue in its opinion and its dismissal of the action on the pleadings merits summary reversal.

2. The Decision in Vitek v. Jones Mandates Summary Reversal

This court's recent decision in *Vitek v. Jones,* ..... U.S. ....., 48 L.W. 4317 (March 25, 1980) controls the due process claim raised by appellant and mandates summary reversal. Section 2684, similar to the statute at issue in *Vitek,* limits transfers to those prisoners who are mentally ill, whose rehabilitation would be expedited, and who would benefit from treatment in a state hospital. Section 2684 thus creates a liberty interest similar to that created by the Nebraska statute in *Vitek.* Finally, the same stigmatizing consequences brought about by a mental hospital transfer as identified in *Vitek* are also present under § 2684.

3. This Court Should Note Probable Jurisdiction to Determine the Validity, Under the Equal Protection Clause, of Statutes Which Permit the Placement of Prisoners in Mental Institutions Pursuant to Procedures and Standards Vastly Different From Those Applied in the Placement of All Other Classes of Individuals

Sections 2684 and 2685 create massive procedural and substantive differences between prisoners confined in county jails and state prisons and between prisoners confined in state prisons and numerous other classes of individuals who, like state prisoners, are deprived of their liberty and "enmeshed in and subject to the criminal justice system" (*Harmon v. McNutt,* 587 P.2d 537, 539 (Wash. Supreme Court 1978)). With the exception of state prisoners confined in a mental institution pursuant to §§ 2684 and 2685, virtually every class of individuals subject to such confinement is afforded stringent procedural safeguards and narrow placement standards. Individuals confined in county jails may be transferred to mental institutions only pursuant to California Penal Code § 4011.6 which incorporates the stringent procedural provisions (including counsel and, at one stage, a court or jury trial) and narrow standards of the Lanterman-Petris-Short Act. See, California Welfare and Institutions Code, §§ 5150, et seq.; California Penal Code § 4011.6, App. F, pp. 2-5. Other classes of individuals who are already deprived of their liberty are also afforded substantial procedural protections prior to their confinement in a mental institution even when, as with state prisoners and county jail inmates, the confinement cannot exceed the period of their sentence. See, *e.g.,*

provisions regarding mentally disordered sex offenders discussed in *In re Moye,* 22 Cal.3d 457, 464 (1978). Finally, what has been described as the "weighty equal protection problems" posed by statutes such as §§ 2684 and 2685 (*Souder v. McGuire,* 516 F.2d 820, 822-823 (3d Cir. 1975)) are exacerbated by the fact that the same persons may be summarily placed and detained in a mental institution pursuant to § 2684 or afforded substantial procedural protections prior to such detention pursuant to the Lanterman-Petris-Short Act. See, Welfare and Institutions Code § 5352.5, App. F., pp. 1-2.

The substantial nature of this question is illustrated by the fact that since 1969 six courts have considered the precise question raised here and in each instance voided statutes strikingly similar to §§ 2684 and 2685 on equal protection grounds. See *Matthews v. Hardy,* 420 F.2d 607 (D.C. Cir. 1969) (Wright, J.), *cert. denied,* 397 U.S. 1010 (1970); *United States ex rel Schuster v. Herold,* 410 F.2d 1071 (2d Cir. 1969), *cert. denied,* 396 U.S. 847 (1969); *Harmon v. McNutt,* 587 P.2d 537, 539 (Wash. Supreme Court 1978); *Chesney v. Adams,* 377 F.Supp. 887 (D. Conn. 1974), *aff'd without opinion,* 508 F.2d 836 (2d Cir. 1975); *United States ex rel. Souder v. Watson,* 413 F.Supp. 711 (M.D. Penn. 1976); *Sites v. McKenzie,* 423 F.Supp. 1190 (N.D. W.Va. 1976). A recent report by experts in the mental health field is in full agreement with the above decisions and recommends that "[a]ll jurisdictions seeking involuntary hospitalization for prisoners should provide safeguards equivalent to those accorded non-prisoners undergoing civil commitment." Report to the President from the President's Commission on Mental Health, p. 73, n.48 (1978).

CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeal of California should be reversed by this Court.

Dated: April 7, 1980.

Respectfully submitted,
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(Appendices Follow)

APPENDICES

APPENDIX A

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

1 Civil No. 45908
(Sup. Ct. No. 67432)

Canal Keyhea, et al.,
Plaintiffs and Appellants,
vs.
J. J. Enomoto, et al.,
Defendants and Respondents.

[Filed Dec. 21, 1979]

Canal Keyhea (Keyhea) filed a complaint in the Solano County Superior Court for declaratory and injunctive relief against J. J. Enomoto, Director of the Department of Corrections; T. L. Clannon, Superintendent of the California Medical Facility; Jerome Lackner, Director of the California Department of Mental Health; Sylvia Winters, Medical Director of Patton State Hospital; Howard Way, former Chairman of the California Adult Authority and present Chairman of the Community Release Board; their agents, employees, and successors in interest (respondents).

A first amended complaint was filed to include as plaintiffs Valamar A. Schaaf and Evelyn Schaaf, two state taxpayers, and to include a class action.

The first amended complaint seeks a declaratory judgment that Penal Code sections 2684 and 2685, which provide for the transfer and commitment of state prisoners to state mental hospitals and Department of Corrections Administrative Manual section 346.15, which provides for the involuntary administration of a psychotropic drug to state prisoners are unconstitutional; an injunction against expending public money and time in enforcing Administrative Manual section 346.15; an injunction against subjecting Keyhea and the class to the involuntary administration of drugs unless the following occurs: a compelling state interest is shown, there is no less onerous alternative and a mandatory hearing incorporating due process procedures is afforded prior to the drugging; an injunction requiring respondents to adhere to the provisions of Administrative Manual section 346.15; an injunction against transferring Keyhea and the class to a state mental hospital without procedural due process protections; an injunction against retention of Keyhea at Patton State Hospital; and an injunction requiring expungement from Keyhea's records any reference to his transfer.

The court filed an order sustaining respondents' demurrer with leave to amend on the following grounds: (1) the court has no jurisdiction as Keyhea has not exhausted his administrative remedies; (2) the complaint does not allege sufficient facts to meet class action criteria; (3) the complaint does not state sufficient facts to constitute a

cause of action under 42 United States Code, section 1983; (4) the complaint does not state facts alleging a proper state taxpayers' action under Code of Civil Procedure section 526a.

The trial court did not reach or rule upon the remaining grounds of demurrer advanced by appellants, including the ground that the first amended complaint did not allege facts sufficient to constitute a cause of action, and we do not rule on that ground at this time. Appellants failed to further amend their complaint. Judgment of dismissal was entered. The appeal is from the judgment.

Keyhea was a state prisoner confined at the Correctional Medical Facility at Vacaville until February 1977.[1] While at Vacaville, psychotropic drugs were administered to Keyhea without his consent.

On March 18, 1977, Keyhea was transferred from the Correctional Medical Facility operated by the Department of Corrections to Patton State Hospital, a hospital for mentally disordered individuals, operated by the Department of Health. Keyhea remained at Patton State Hospital until May 19, 1978, when he was released on parole. On July 19, 1979, Keyhea was returned to state prison for a 90-day psychiatric observation. The 90-day period has now

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[1]Since the trial court sustained respondents' demurrer we must accept the allegations of appellant's first amended complaint as true, determining whether such allegations state, or can be amended to state, a cause of action. (See Griffith v. Department of Public Works (1956) 141 Cal.App.2d 376, 379-380.)

expired. It also appears that his parole period has now expired and that he is entitled to discharge from custody.[2]

Appellants Valamar Schaaf and Evelyn Schaaf have alleged in the first amended complaint that section 346.15 of the California Department of Corrections Administrative Manual is unconstitutional, thus expenditure of funds pursuant to section 346.15 is illegal and wasteful.

Appellants Schaaf assert standing pursuant to Code of Civil Procedure section 526a, which provides that "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city, or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ."

The issue before us is whether Code of Civil Procedure section 526a applies to suits directed at state agencies and state officials despite its omission of any reference to such parties.

Appellants rely upon several cases which have held that a liberal interpretation of section 526a includes suits against state agencies and officials. (Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146; Serrano v. Priest (1971) 5 Cal.3d 584; Blair v. Pitchess (1971) 5 Cal.3d 258;

[2]The information relative to Keyhea's parole and discharge is supplied by the Attorney General and is not contradicted by appellants' counsel.

Marin Hospital Dist. v. Department of Health (1979) 92 Cal.App.3d 442; Los Altos Property Owners Assn. v. Hutcheon (1977) 69 Cal.App.3d 22; Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal.App.3d 769.)

Respondents contend that a major flaw appears in all of these cases in that each case has relied upon the holding in preceding cases and by so doing has perpetuated an erroneous interpretation of section 526a. In *Ahlgren v. Carr* (1962) 209 Cal.App.2d 248, the court discussed the *common law* right of a taxpayer to enjoin an unlawful expenditure of state funds. The discussion made no reference to Code of Civil Procedure section 526a. Under common law authority, "a taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." (Gogerty v. Coachella Valley Junior College Dist. (1962) 57 Cal.2d 727, 730.) Relying upon *Gogerty*, which found that the common law theory was not limited to municipalities, but applied to all governmental bodies, the court in *Ahlgren* held that a taxpayer has the right to maintain an action against state officers and agencies. (Ahlgren v. Carr, *supra*, 209 Cal.App.2d 248 at p. 254.) In *California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, the court cited *Ahlgren v. Carr*, as authority for holding that the taxpayer/plaintiff had a common law right to bring an action against the state.

The defective interpretation of section 526a, according to respondents, began with *Blair v. Pitchess, supra*, 5 Cal. 3d 258, which relied upon *Ahlgren v. Carr* and *California*

State Employees' Assn. v. Williams, supra, as support for its statement that "it has been held that taxpayers may sue *state* officials to enjoin such officials from illegally expending state funds [under Code of Civil Procedure section 526a"] (emphasis in original) (Blair v. Pitchess, *supra,* 5 Cal.3d 258 at p. 268). Obviously, the court erred in relying upon either case as authority for the right of taxpayers to sue state officials under section 526a when both cases dealt solely with the common law theory and not with the statutory rule. With its genesis in *Blair v. Pitchess,* the erroneous interpretation continued. In *Serrano v. Priest, supra,* 5 Cal.3d 584, the court stated in a footnote that "it has been held that state officers too may be sued under section 526a. (Blair v. Pitchess, *ante,* p. 258, at p. 267; California State Employees' Assn. v. Williams (1970) 7 Cal.App.3d 390, 395 [86 Cal.Rptr. 305]; Ahlgren v. Carr (1962) 209 Cal.App.2d 248, 252-254 [25 Cal. Rptr. 887])." (*Id.,* at p. 618, fn. 38.) *Blair* was again cited in *Adams v. Department of Motor Vehicles, supra,* 11 Cal. 3d 146, 151 and *Duskin v. San Francisco Redevelopment Agency, supra,* 31 Cal.App.3d 769, 773, for authority that state officials may be sued under section 526a.

Respondents further claim that the Court of Appeal cases have utilized the liberal, albeit erroneous, interpretation of section 526a to extend coverage of section 526a to school districts (Los Altos Property Owners Assn. v. Hutcheon, *supra,* 69 Cal.App.3d 22, 26-30) and to hospital districts (Marin Hospital Dist. v. Department of Health, *supra,* 92 Cal.App.3d 442 at p. 450).

Respondents further contend that it is clear from a study of the cases that the Supreme Court's erroneous holding in *Blair v. Pitchess* has been repeated.[3] Section 526a states that only certain governmental bodies are subject to a taxpayer's suit. The State of California is clearly omitted from the section and it does not appear that such omission was an oversight on the part of the Legislature. Section 526a was adopted in 1909 (ch. 348, § 1, p. 578), amended in 1911 (ch. 71, § 1, p. 87), and 1967 (ch. 706, § 1, p. 2080). Had the Legislature intended to extend coverage to the State of California, then surely the omission would have been corrected by now. This court is bound by the clear wording of the statute and may not provide additional words to alter its purpose. (People v. Knowles (1950) 35 Cal.2d 175, 183.)

Nevertheless, our Supreme Court in *Serrano v. Priest, supra,* 5 Cal.3d 584 at page 618, footnote 38, stated: "It has been held that state officers too may be sued under section 526a," and again in *Stanton v. Mott* (1976) 17 Cal. 3d 206, 223, the court cited section 526a as authority for a taxpayer to sue a state officer. In addition, there is another authority which gives a taxpayer the right to sue state agencies and state officials; the common law. The common law theory, however, is limited to certain grounds for bringing suit against the state: "fraud, collusion, ultra vires, or a failure . . . to perform a duty specifically enjoined" (Silver v. City of Los Angeles (1961) 57 Cal.2d 39, 40-41).

---

[3]The court in *Los Altos Property Owners Assn. v. Hutcheon, supra,* 69 Cal.App.3d 22, noted that the *Ahlgren* case did not make any reference to section 526a. (*Id.,* at p. 27, fn. 6.)

In order for appellants Schaaf to assert standing under the common law rule, their allegation of wrongdoing must fall within one of the classifications specified in *Silver.* Appellants Schaaf contend that respondent California Department of Corrections unlawfully expended funds pursuant to an allegedly unconstitutional section in the department's Administrative Manual. The court in *Ahlgren v. Carr, supra,* 209 Cal.App.2d 248, found that, under the common law rule, plaintiff taxpayers have a right to sue state officials for illegally expending public funds. Although the court did not specify which *Silver* classification such action comes within, by deductive reasoning it is clear that the illegal expenditure was an ultra vires act of the governmental body. There were no facts in *Ahlgren* to support the remaining three classifications: fraud, collusion nor failure of the state to perform a duty enjoined. The court in *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, specifically held that an illegal expenditure of public funds is an ultra vires act. (*Id.,* at pp. 504-505.)

Thus, appellants, as taxpayers, have standing to bring an action against state officers and the trial court erred in sustaining the demurrer on this ground.

II

The trial court held "The court has no jurisdiction of this action as it does not appear in the complaint that plaintiffs have exhausted their administrative remedies." Generally, where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will

act. (See Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280.)

Appellant Keyhea, however, contends that under the circumstances of this case, exhaustion of remedies would be futile. His argument is based upon the premise that raising a constitutional challenge to a state statute before an administrative agency which does not have the power to declare the statute unconstitutional would be a futile act.

There has been a consensus in California courts that exhaustion of remedies is a prerequisite to judicial relief even where the statute to be applied is challenged on constitutional grounds. (United States v. Superior Court (1941) 19 Cal.2d 189, 195; Morton v. Superior Court (1970) 9 Cal.App.3d 977; Walker v. Munro (1960) 178 Cal.App.2d 67.) *Walker v. Munro* has been criticized and disapproved in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251, where the Supreme Court allowed the petitioner to challenge the constitutionality of the Coastal Zone Conservation Act in court without first raising the issue before the Coastal Zone Conservation Commission. The court noted that "since an administrative agency is not the appropriate forum in which to challenge the constitutionality of the basic statute under which it operates, there seems little reason to require a litigant to raise the constitutional issue in proceedings before the agency as a condition of raising that issue in the courts." (*Id.,* at p. 251.)

However, in a later case, *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, the Supreme Court held that the Public Utilities Commission

may declare a duly enacted statute unconstitutional. The court noted that the Constitution and statutes of this state grant the commission wide administrative, legislative and judicial powers. (*Id.*, at p. 311, fn. 2.)

It is unclear, as pointed out in *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, how *Southern Pac. Transportation Co.* can be reconciled with *State of California v. Superior Court.* The court in *Hand* concluded that the most reasonable manner in which these two cases can be harmonized is to construe *Southern Pac. Transportation Co.* as allowing only those administrative agencies which are of constitutional origin to determine constitutional challenges to statutes enacted by the Legislature. (*Id.*, at p. 619.)

It has not yet been determined by an appellate court whether the Department of Corrections is an agency of constitutional origin. Although the Department of Corrections was not specifically created by the Constitution, it was created by the Legislature in the exercise of a delegation conferred on it by an express provision of the Constitution. The question, however, of whether agencies of constitutional origin or legislative origin have the power to declare statutes unconstitutional is no longer material. In 1978, article III, section 3.5 of the California Constitution, was amended to provide that administrative agencies are without power to determine constitutional challenges to legislative enactments. It specifically states that:

> "Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

On the basis of this constitutional amendment alone, we must conclude that the Department of Corrections, be it an agency of constitutional origin or legislative origin, may not decide the constitutional challenges raised by Keyhea. Since the only issues appellant Keyhea raises are of a constitutional nature, he is exempt from exhausting his administrative remedies before seeking judicial relief. (Hand v. Board of Examiners, *supra,* 66 Cal.App.3d 605, at p. 619.) Thus, the court erred in concluding that appellant Keyhea had a duty to exhaust, but failed to exhaust, his administrative remedies.

III

Appellant Keyhea alleges that he represents an ascertainable class.

Code of Civil Procedure section 382 provides that "when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The requirements for sustaining a class action are clear: (1) there must be an ascertainable class and (2) there must be a well defined community of

interest in the questions of law and fact involved affecting the parties to be represented. (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 704.)

The first requisite for maintenance of a class action, ascertainability of the class, presents a serious obstacle in the case at bench. The number of members is indefinite and although we do not require the identity of the individual members of the class, it is a prerequisite to establish the existence of an ascertainable class. It is not possible to ascertain what persons will be incarcerated in the future in a state prison and subject to the provisions of Administrative Manual section 346.15 and Penal Code sections 2684 and 2685. In *Alvarez v. Wiley* (1977) 71 Cal. App.3d 599, the court held that a class action could not be sustained where the complaint alleges that members of the class consist of future heroin addicts confined in the Tulare County Jail. (*Id.*, at p. 602.)

In *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, the court found that including as members of the class all persons who will suffer in the future convictions under Vehicle Code section 23102, subdivision (a), would result in an incognizable and unmanageable class of plaintiffs. (*Id.*, at p. 629.)

It does not appear from the record that appellant Keyhea is now a member of the interested class he claims to represent, a requisite element to the maintenance of a class action. (LaSala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, 875 and all cases cited at p. 875, fn. 7.) There is no community of interest between appellant Keyhea and the other members of the class for they are

not similarly situated since Keyhea is no long incarcerated in the state prison nor subject to Administrative Manual section 346.15 and to Penal Code sections 2684 and 2685.

At the time of filing his complaint on July 15, 1977, appellant Keyhea was confined at Patton State Hospital. He was, however, released on parole on May 19, 1978, approximately five months before the court filed an order sustaining the demurrer to the first amended complaint. He was subsequently returned to prison for 90 days but that period has now expired. Also, it appears that Keyhea's parole period has now expired and that he is entitled to or has been discharged from custody.

In support of his contention that he continues to represent the class despite his present status, appellant Keyhea cites us to *Geraghty v. United States Parole Commission* (1978) 579 F.2d 238. In that case, it is held that once a *class action is certified,* the mooting of a claim set forth by the named plaintiff does not automatically deprive a court of jurisdiction over the cause of action asserted by the class. (*Id.*, at p. 248.) Keyhea's suit, however, was not properly certified as a class action *before* he was released on parole, thus it is not jurisdictionally appropriate to continue to entertain the suit. (See Geraghty v. United States Parole Commission, *supra,* 579 F.2d 238.)

IV

It is unnecessary to determine whether appellants' contentions state sufficient facts to constitute a cause of action under 42 United States Code, section 1983, since the action has become moot due to Keyhea's discharge

from custody. Although the trial court did not consider the issue of mootness raised in the demurrer, it is our prerogative to determine whether the action is moot. If any of the grounds raised in the demurrer are sustainable, we must affirm the trial court's ruling. (Gonzales v. State of California, *supra*, 68 Cal.App.3d 621 at p. 627.)

At the time Keyhea filed the first amended complaint, he was confined in Patton State Hospital. However, he was released on parole before the trial court issued its order sustaining the demurrer.

"[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." (Wilson v. L. A. County Civil Service Com. (1952) 112 Cal.App.2d 450, 453.)

Here, we have no actual controversy as to Keyhea. He is no longer subjected to Penal Code sections 2684 and 2685 and Administrative Manual section 346.15. Any rights Keyhea may have had pursuant to those provisions do not presently exist.

Appellant Keyhea relies upon three federal cases to support his proposition that an inmate's release on parole does not render the action moot. (Evans v. Paderick (1977) 443 F.Supp. 583; Souder v. McGuire (1976) 423 F.Supp. 830; Fhagen v. Miller (1969) 306 F.Supp. 634.) Although all three inmates challenged the constitutionality of the procedures authorizing commitment to a state mental hospital, none of the inmates had been released

on parole. Each inmate had been returned to prison at the time of the judicial determination of the issues. Yet, the courts found that the actions were not moot, especially in light of each inmate's history of prior commitments to the state mental hospital.

The possibility of future commitments of Keyhea appears remote and speculative. At the present time there are no facts to support the contention that Keyhea, now discharged, will be recommitted. Due to the absence of a justiciable controversy, this court is unable to render an effective decree responsive to appellants' complaint.

The judgment of dismissal is affirmed as to -Canal Keyhea, individually and on behalf of all others similarly situated. The judgment is reversed as to Valamar A. Schaaf and Evelyn Schaaf and the cause is remanded to the trial court for further proceedings consistent with this opinion. Appellants Valamar A. Schaaf and Evelyn Schaaf to recover their costs on appeal. The other parties to bear their own costs on appeal.

Caldecott, P. J.

We concur:

Rattigan, J.

Christian, J.

APPENDIX B

Court of Appeal of the State of California

First Appellate District

Division Four

1 Civ. No. 45908
Superior Court No. 67432

Canal Keyhea, et al.,
Plaintiffs and Appellants,
vs.
J. J. Enomoto, et al.,
Defendants and Respondents.

[Filed Jan. 18, 1980]

ORDER MODIFYING OPINION
AND DENYING REHEARING.

BY THE COURT:

It is ordered that the opinion filed herein on December 21, 1979, be modified in the following particulars:

On page 1, line 1 should be changed to read as follows:

Canal Keyhea (Keyhea) filed a complaint on behalf of himself and all others similarly situated in the [the sentence then continues as is with no other changes].

On page 1, line 12 should end with a period after the word taxpayers; line 13 should be deleted.

On page 3, line 15 (beginning of the third full paragraph), the date March 18, should be changed to February 3.

On page 16, a new paragraph should begin after line 16, which will read:

Appellant's request to take judicial notice is granted.

The petitions for rehearing are denied.

Dated Jan. 18, 1980

CALDECOTT, P.J.

APPENDIX C

In the Superior Court
of the
State of California
in and for the
County of Solano

No. 67432

Canal Keyhea, et al.,
Plaintiffs,

vs.

J. J. Enomoto, et al.,
Defendants.

[Filed Nov. 28, 1978]

JUDGMENT OF DISMISSAL AFTER ORDER SUSTAINING DEMURRER

WHEREAS, defendants' demurrer to plaintiffs' First Amended Complaint and amendment thereto has been sustained and the time within which the Court granted leave to amend said complaint has expired and plaintiffs have failed to file any amended complaint; and

WHEREAS, said order sustaining the demurrer herein was rendered on October 12, 1978, and plaintiffs were served notice of said ruling on October 18, 1978; and application has been made to the Clerk of this Court for entry

of judgment in favor of defendants and against plaintiffs and good cause appearing therefor;

IT IS ORDERED, ADJUDGED, AND DECREED that this action be and the same hereby is, dismissed with prejudice; plaintiffs to take nothing by this action.

Dated: Nov. 27, 1978

ELLIS R. RANDALL
Judge of the Superior Court

In the Superior Court
of the
State of California
in and for the
County of Solano
Department No. 3

No. 67432

Canal Keyhea, et al.,
Plaintiffs,

vs.

J. J. Enomoto, et al.,
Defendants.

[Filed Oct. 13, 1978]

ORDER SUSTAINING DEMURRER

Defendants' demurrer was heard on February 17, 1978. Plaintiff appeared by Peter J. Sheehan. Deputy Attorney General Karl S. Mayer appeared for defendants. The last letter brief was filed on July 21, 1978.

The court has carefully read and considered the points and authorities presented by the parties. The court notes the complaint was filed on July 15, 1977. Plaintiffs were allowed to amend the complaint and later added an amendment to the amendment. The posture of the case as pointed out by defendants is that the complaint pleads a federal civil rights action, a taxpayer's action, a class action, mul-

tiple demands for declaratory and injunctive relief, including expungement of records, thirteen distinct state and federal constitutional provisions, four distinct state and federal statutes, a number of Department of Corrections, Community Release Board and Department of Health regulations to consider and an unnecessary large number of defendants. Defendants complain "though the action as framed may seem to be a law review editor's delight, it is a judge's and a litigant's nightmare".

Defendants' demurrer is contained in thirty-nine objections to five causes of action in the first amended complaint. Plaintiffs' answer to defendants' objections is contained in 64 pages of contrary reasoning. More briefs and differing contentions are stated back and forth in many more pages of memoranda.

The court has spent many, many hours in an attempt to reconcile the opposing points of view and finds and concludes for purposes of this demurrer as follows:

(1) The court has no jurisdiction of this action as it does not appear in the complaint that plaintiffs have exhausted their administrative remedies.

(2) The complaint does not allege sufficient facts to meet class action criteria.

(3) The complaint does not state sufficient facts to constitute a cause of action under 42 U.S.C. Section 1983.

(4) The complaint does not state facts alleging a proper state taxpayers' action under C.C.P. Section 526a.

For the reasons stated above, the court does not reach the remaining grounds of demurrer advanced by defendants. Accordingly,

IT IS HEREBY ORDERED that said demurrer be and the same is hereby sustained with thirty (30) days allowed to amend.

Dated: October 12th, 1978.

/s/ ELLIS R. RANDALL
Judge of the Superior Court

APPENDIX D

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Feb. 27, 1980

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 45908

Keyhea et al.

vs.

J. J. Enomoto, et al.

Respectfully,

G. E. BISHEL
Clerk

68378-877 2-79 4M OSP

APPENDIX E

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

Canal Keyhea, et al.,
Appellant,

vs.

J. J. Enomoto, et al.,
Appellees.

[Filed Mar. 10, 1980]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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NOTICE IS HEREBY GIVEN that Canal Keyhea, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, affirming the dismissal of the complaint as to Canal Keyhea, entered in this action on March 4, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: March 6, 1980

/s/ PETER E. SHEEHAN
Peter E. Sheehan
Counsel for Appellant

PROOF OF SERVICE BY MAIL

I, the undersigned, state I am over 18 years of age, a resident of Alameda County, and not a party to the within action; my business address is 2357 San Pablo Avenue, Oakland, CA 94612. On March 6, 1980, I served a true copy of the attached Notice of Appeal to the Supreme Court of the United States.

By placing said copy in an envelope addressed as follows:

Karl Mayer	Clerk
Deputy Attorney General	Superior Court
6000 State Bldg.	Solano County
San Francisco, CA 94102	Fairfield, CA 94533

Said envelope was then sealed and postage fully prepaid thereon and deposited in the United States mail at Oakland, Alameda County, California. That there is delivery service by the U.S. mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 6, 1980, at Oakland, California.

/s/ MARY ANN WONG
Declarant

APPENDIX F

STATUTORY PROVISIONS INVOLVED

California Welfare and Institutions Code § 5352.5:

Conservatorship proceedings may be initiated for any person committed to a state hospital or local mental health facility or placed on outpatient treatment pursuant to Section 1026 or 1370 of the Penal Code or transferred pursuant to Section 4011.6 of the Penal Code upon recommendation of the medical director of the state hospital, or his designee, or professional person in charge of the local mental health facility, or his designee, or the local mental health director, or his designee, to the conservatorship investigator of the county of resident of the person prior to his admission to the hospital or facility or of the county in which the hospital or facility is located. The initiation of conservatorship proceedings or the existence of a conservatorship shall not affect any pending criminal proceedings.

Subject to the provisions of Sections 5150 and 5250, conservatorship proceedings may be initiated for any person convicted of a felony who has been transferred to a state hospital under the jurisdiction of the State Department of Mental Health pursuant to Section 2684 of the Penal Code by the recommendation of the superintendent of the state hospital to the conservatorship investigator of the county of residence of the person or of the county in which the state hospital is located.

Subject to the provisions of Sections 5150 and 5250, conservatorship proceedings may be initiated for any person committed to the Youth Authority, or on parole from a facility of the Youth Authority, by the Director of the De-

partment of the Youth Authority or his designee, to the conservatorship investigator of the county of residence of such person or of the county in which such facility is situated.

The county mental health program providing conservatorship investigation services and conservatorship case management services for any such persons except those transferred pursuant to Section 4011.6 of the Penal Code shall be reimbursed for the expenditures made by it for such services pursuant to the Short-Doyle Act (commencing with Section 5600) at 100 percent of such expenditures. Each county Short-Doyle plan shall include provision for such services in the plan.

California Penal Code § 4011.6:

In any case in which it appears to the person in charge of a county jail, city jail, or juvenile detention facility, or to any judge of a court in the county in which the jail or juvenile detention facility is located that a person in custody in such jail or juvenile detention facility may be mentally disordered, he may cause such prisoner to be taken to a facility for 72-hour treatment and evaluation pursuant to Section 5150 of the Welfare and Institutions Code and he shall inform the facility in writing which shall be confidential, of the reasons that such person is being taken to the facility. The local mental health director or his designee may examine the prisoner prior to transfer to a facility for treatment and evaluation. Thereupon, the provisions of Article 1 (commencing with Section 5150), Article 4 (commencing with Section 5250), Article 4.5 (commencing with Section 5260), Article 5 (commencing with Section 5275),

Article 6 (commencing with Section 5300), and Article 7 (commencing with Section 5325) of Chapter 2 and Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code shall apply to the prisoner.

Where the court causes the prisoner to be transferred to a 72-hour facility, the court shall forthwith notify the local mental health director or his designee, the prosecuting attorney, and counsel for the prisoner in the criminal or juvenile proceedings about such transfer. Where the person in charge of the jail or juvenile detention facility causes the transfer of the prisoner to a 72-hour facility the person shall immediately notify the local mental health director or his designee and each court within the county where the prisoner has a pending proceeding about such transfer; upon notification by the person in charge of the jail or juvenile detention facility the court shall forthwith notify counsel for the prisoner and the prosecuting attorney in the criminal proceedings about such transfer.

If the prisoner is detained in, or remanded to, a facility pursuant to such articles of the Welfare and Institutions Code, the facility shall transmit a report, which shall be confidential, to the person in charge of the jail or juvenile detention facility or judge of the court who caused the prisoner to be taken to the facility and to the local mental health director or his designee, concerning the condition of the prisoner. A new report shall be transmitted at the end of each period of confinement provided for in such articles, upon conversion to voluntary status, and upon filing of temporary letter of conservatorship.

A prisoner who has been transferred to an inpatient facility pursuant to this section, may convert to voluntary inpatient status without obtaining the consent of the court, the person in charge of the jail or juvenile detention facility, or the local mental health director. At the beginning of such conversion to voluntary status, the person in charge of the facility shall transmit a report to the person in charge of the jail or juvenile detention facility or judge of the court who caused the prisoner to be taken to the facility, counsel for the prisoner, prosecuting attorney, and local mental health director or his designee.

If the prisoner is detained in, or remanded to, a facility pursuant to such articles of the Welfare and Institutions Code, the time passed therein shall count as part of the prisoner's sentence. When the prisoner is so detained or remanded, the person in charge of the jail or juvenile detention facility shall advise the professional person in charge of the facility of the expiration date of the prisoner's sentence. If the prisoner is to be released from the facility before such expiration date, the professional person in charge shall notify the local mental health director or his designee, counsel for the prisoner, the prosecuting attorney, and the person in charge of the jail or juvenile detention facility, who shall send for, take, and receive the prisoner back into the jail or juvenile detention facility.

A defendant, either charged with or convicted of a criminal offense, or a minor alleged to be within the jurisdiction of the juvenile court may be concurrently subject

to the provisions of the Lanterman-Petris-Short Act (Division 5, Part 1, Welfare and Institutions Code).

If a prisoner is detained in a facility pursuant to such articles of the Welfare and Institutions Code and if the person in charge of such facility determines that arraignment or trial would be detrimental to the well-being of the prisoner, the time spent therein shall not be computed in any statutory time requirements for arraingment or trial in any pending criminal or juvenile proceedings. Otherwise, nothing contained herein shall affect any statutory time requirements for arraignment or trial in any pending criminal or juvenile proceedings.

For purposes of this section, the term "juvenile detention facility" includes any state, county, or private home or institution in which wards or dependent children of the juvenile court or persons awaiting a hearing before the juvenile court are detained.

Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1597

CANAL KEYHEA,
Appellant,

VS.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.,
Appellees.

On Appeal from the Court of Appeal for the State of California, First Appellate District

MOTION TO DISMISS OR AFFIRM

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Wolff v. McDonnell, 418 U.S. 539 (1974)	11

Statutes

California Code of Civil Procedure, section 526a	6
California Penal Code, section 2684	3, 5, 8, 9
Title 28, United States Code section 1257	9
Title 28, United States Code section 1257(2)	2, 5, 8, 9, 10
Title 28, United States Code section 2103	2, 8
Title 42, United States Code section 1983	3, 5, 7

Rule

Rules of the Supreme Court of the United States, Rule 16	1

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1597

CANAL KEYHEA,
Appellant,

vs.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.,
Appellees.

On Appeal from the Court of Appeal for the State of California, First Appellate District

MOTION TO DISMISS OR AFFIRM

Pursuant to rule 16, revised rules of this Court, appellees move to dismiss the appeal on the grounds that it does not present a substantial federal question, and that the judgment of the state court below is not in favor of the validity of any state statute challenged by appellant as repugnant to the Constitution of the United States. In the alternative, appellees move to affirm the judgment of the California Court of Appeal on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

If, pursuant to Title 28, United States Code section 2103, the appeal is treated as a petition for writ of certiorari, appellees submit that the petition should be denied.

OPINION BELOW

On December 21, 1979, the California Court of Appeal filed its decision affirming dismissal of appellant's civil action in the Superior Court of California. This unpublished decision is set out in Appendix B of this motion. By order filed January 18, 1980, the Court of Appeal modified its opinion and denied rehearing. On February 27, 1980, the Supreme Court of California denied hearing. These orders denying rehearing and denying hearing are also set out in Appendix B of this motion.

JURISDICTION

Appellant invokes the jurisdiction of this Court under Title 28, United States Code section 1257(2).

QUESTION PRESENTED

Whether this Court's opinion in *Vitek v. Jones,* ..... U.S. ....., 100 S.Ct. 1254 (No. 78-1155, March 25, 1980) applies retroactively so as to require expungement of records of past transfers of state prisoners who have since been discharged from all custody.

STATEMENT OF THE CASE

A. Introduction

Appellant, Canal Keyhea, was a California state prisoner sentenced in 1969 upon conviction of robbery and in 1972 upon conviction of attempted murder.

In February 1977 appellant was transferred from an institution of the California Department of Corrections to an institution of the California Department of Mental Hygiene pursuant to Penal Code section 2684.[1]

In July 1977 appellant filed his original complaint in the Superior Court of California for the County of Solano purporting to commence a civil rights action under Title 42, United States Code section 1983 on behalf of appellant individually and as a class action on behalf of all others

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[1]At the time of appellant's transfer Penal Code section 2684 provided as follows:

> "If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the Department of Mental Hygiene, the Director of Corrections, with the approval of the Adult Authority, shall certify that fact to the Director of Mental Hygiene who may authorize receipt of such prisoner at one of such hospitals for care and treatment. The superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in a state hospital."

Penal Code section 2684 has since been amended and now reads as follows:

> "If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Board of Prison Terms for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he would benefit from care and treatment in a state hospital. If the director of the appropriate department so determines, the superintendent of the hospital shall receive the prisoner and keep him until in the opinion of the superintendent such person has been treated to such an extent that he will not benefit from further care and treatment in the state hospital."

similarly situated. In November 1977 an amended complaint was filed in the superior court to add to the action a taxpayers' action under state law. In January 1978 appellees filed a demurrer to the amended complaint. In March 1978 appellant, and the taxpayers, filed an amendment to the amended complaint.

In May 1978 appellant was released on parole.

In October 1978 the superior court sustained appellees' demurrer with leave to appellant to amend the complaint. Upon appellant's failure to further amend the complaint and at appellant's request, the superior court entered judgment of dismissal of the action. The order of the superior court sustaining appellees' demurrer and the judgment of dismissal are set out in Appendix A of this motion.

In December 1978 appellant filed notice of appeal to the California Court of Appeal.

In July 1979 appellant was returned to state prison for a 90-day period of observation. In November 1979 appellant was released from prison and discharged from all custody (Appellant's Jurisdictional Statement, p. 7).

On December 21, 1979, the California Court of Appeal filed its opinion affirming dismissal of the action as to appellant Keyhea individually and determining that Keyhea is not a proper representative of the alleged class of all others similarly situated. The Court of Appeal reversed the judgment of dismissal as to the taxpayers' action. On January 18, 1979, the Court of Appeal denied rehearing and on February 27, 1980, the Supreme Court of California denied hearing. The opinion of the California Court of

Appeal, the order denying rehearing, and the order denying hearing are set out in Appendix B of this motion.

On or about March 6, 1980, appellant filed in the California Court of Appeal his notice of appeal to this Court pursuant to Title 28, United States Code section 1257(2). The notice of appeal states the appeal is "... from the final judgment of the Court of Appeal of the State of California, affirming the dismissal of the complaint as to Canal Keyhea ...." The notice of appeal is set out in Appendix B of this motion.

On April 25, 1980, on remand from the California Court of Appeal, Superior Court Judge Randall overruled appellees' demurrer with respect to the taxpayers' action and permitted appellees' thirty days within which to file an answer. This order of the superior court is set out in Appendix C of this motion.

B. Proceedings Below

Approximately five months after appellant's 1977 transfer from the Department of Corrections to the Department of Mental Hygiene appellant initiated a civil action in a California state court under 42 United States Code section 1983.[2] Appellant's complaint challenged as repugnant to the Constitution of the United States administrative regulations governing involuntary psychotropic medication within the Department of Corrections, and California Penal Code section 2684 and administrative regulations and

[2]California state courts are authorized to exercise concurrent jurisdiction in actions under 42 United States Code section 1983. *Brown v. Pitchess*, 13 Cal.3d 518, 119 Cal.Rptr. 204, 531 P.2d 772 (1975); *Williams v. Horvath*, 16 Cal.3d 834, 837, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976).

practices implementing the statute governing transfer of mentally ill state prisoners from an institution of the Department of Corrections to an institution of the Department of Mental Hygiene. The complaint sought only declaratory and injunctive relief, and not monetary relief, upon allegations that involuntary medication and involuntary interdepartmental transfer were not attended by minimum procedural due process safeguards required by the Constitution of the United States. The action was alleged as an individual action on behalf of Keyhea and as a class action on behalf of all other state prisoners similarly situated. The original complaint appears at CT 1-30.[3]

The first-amended complaint, filed November 17, 1977, repeated appellant's allegations in the original complaint and added allegations by state taxpayers for a taxpayers' action under California Code of Civil Procedure section 526a. The first-amended complaint appears at CT 31-62. A subsequent amendment to the first-amended complaint, filed March 2, 1978, appears at CT 207-212. The taxpayers' action challenges only involuntary medication within the Department of Corrections. Appellant's individual action and putative class action challenged both involuntary medication and involuntary interdepartmental transfer.

Neither the original complaint, nor the first-amended complaint, nor the amendment to the first-amended complaint allege that appellant, or any other person subject to the challenged provisions, in fact was not mentally ill.

[3]"CT" refers to the superior court Clerk's Transcript on appeal to the California Court of Appeal. This transcript is the primary record upon which the Court of Appeal relied for its decision.

The complaint sought declarations that regulations and practices involving involuntary medication and involuntary interdepartmental transfer are constitutionally infirm for failure to provide sufficient features of procedural due process, an injunction barring involuntary medication or involuntary interdepartmental transfer without following numerous specific provisions of due process alleged necessary in the complaint (for involuntary medication, CT 39:13-40:1; for involuntary interdepartmental transfer, CT 48:16-49:1), and on behalf of Keyhea individually, and not on behalf of other members of the putative class, an injunction against retention of plaintiff at the state hospital[4] and an injunction ordering expungement of all references in Keyhea's records to forced drugging and to interdepartmental transfer (CT 52-53).

On October 12, 1978, the superior court filed its order sustaining appellees' demurrer upon four specified grounds: (1) lack of jurisdiction in the superior court for appellant's failure to have exhausted state administrative remedies; (2) insufficiency of allegations in the complaint to meet class action criteria; (3) insufficiency of the complaint to state a cause of action under 42 United States Code section 1983; (4) insufficiency of the complaint to state a state taxpayers' action under state law. The order of the superior court is set out in Appendix A of this motion. In light of the superior court's order sustaining appellees' demurrer, appellant's statement in the jurisdictional statement that the trial court rejected on the

[4]It would appear that such relief may not be had in an action under Title 42, United States Code section 1983. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

merits appellant's claims that Penal Code section 2684 violated due process and equal protection (Jurisdictional Statement, p. 8) should not be taken to mean that the trial court determined the statute valid under the Constitution.

The decision of the California Court of Appeal, as a matter of state law, reinstated the taxpayers' action challenging involuntary medication within the Department of Corrections. The state Court of Appeal affirmed, however, the trial court's judgment of dismissal of appellant's action upon the ground that appellant's intervening discharge from all custody rendered the action moot as to Keyhea individually, and rendered Keyhea an improper representative of the class.

SUMMARY OF APPELLEES' ARGUMENT

As the decision of the California Court of Appeal did not determine that Penal Code section 2684, or any other statute or regulation challenged in the underlying action as repugnant to the Constitution, is valid under the Constitution, no appeal lies under Title 28, United States Code section 1257(2).

Appellant's jurisdictional statement specifies that he does not appeal disposition of his claims respecting involuntary medication (Jurisdictional Statement, p. 5). Appellant does not appeal the determination of the Court of Appeal that appellant is not a proper class representative.

If, pursuant to Title 28, United States Code section 2103, the appeal is treated as a petition for writ of certiorari, the petition should be denied. The principal federal question sought to be resolved in appellant's underlying

action has now been definitively resolved by this Court in *Vitek v. Jones, supra.* This Court should reject appellant's request that the opinion in *Vitek v. Jones* be made fully retroactive so as to require expungement of records of appellant's interdepartmental transfer. This Court should also decline to reach appellant's argument that equal protection requires that the same due process govern both state prisoner transfers and involuntary civil commitments to state mental hospitals.

ARGUMENT

I

AS THE DECISION BELOW DOES NOT COME WITHIN THE PROVISIONS OF TITLE 28, UNITED STATES CODE SECTION 1257(2) NO APPEAL LIES

Title 28, United States Code section 1257 provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . . (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Although appellant challenged the validity of California Penal Code section 2684, and the validity of implementing regulations and administrative practices under the statute, in the superior court and on appeal to the California Court of Appeal neither court rendered a decision that the statute, or regulations and practices under the statute, are valid under the Constitution or laws of the United States.

The California superior court sustained appellees' demurrer upon the superior court's view of the sufficiency of the complaint. Upon appellant's failure to amend the complaint and upon appellant's request judgment of dismissal was entered by the superior court. The California Court of Appeal affirmed dismissal of appellant's action upon the ground that appellant's intervening complete discharge from all custody rendered appellant's action moot.

As the state court decision from which the appeal is taken did not determine that a challenged state law is valid under the Constitution or laws of the United States it is appropriate for this Court to determine that no appeal lies under Title 28, United States Code section 1257(2). *Kulko v. California Superior Court,* 436 U.S. 84, 90 (1978); *Addington v. Texas,* 441 U.S. 418, 422-423 (1979).

II

THIS COURT'S OPINION IN VITEK v. JONES SHOULD NOT BE HELD TO APPLY RETROACTIVELY

This Court's opinion in *Vitek v. Jones,* ..... U.S. ....., 100 S.Ct. 1254 (1980), specifies the minimum due process required for involuntary transfer of state prisoners from a correctional institution to a state mental hospital for treatment of mental illness. This decision therefore resolves the principal federal question sought to have been litigated in appellant's state court action.

Although appellant has been completely discharged from all custody, and therefore is no longer subject to the proceedings to which the *Vitek* procedures would apply, he nevertheless wishes to litigate in this Court his entitlement to expungement of state records of his interdepartmental transfer. Such relief would require this Court to determine that the decision in *Vitek v. Jones* is fully retroactive.

To apply *Vitek v. Jones* to all past interdepartmental transfers would cast enormous administrative burdens on the departments of corrections and the mental health departments of the several states, and would not be consistent with the opinions of this Court from which the procedures in *Vitek v. Jones* were taken. For purposes of this motion appellees do not now have available statistics from other states or from the Federal Bureau of Prisons regarding the annual number of such interdepartmental transfers. However, available California statistics indicate that approximately 125 such transfers have occurred annually in California's system.

In determining what process is due, this Court in *Vitek v. Jones* relied upon the opinions in *Morrissey v. Brewer,* 408 U.S. 471 (1972) (due process at parole revocation proceedings); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (due process at serious prison disciplinary proceedings), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) (due process at probation revocation proceedings). These decisions are each prospective only. Indeed, in *Wolff v. McDonnell, supra,* retroactivity was sought for the same reason that appellant seeks retroactivity in the instant action: to require that records of past proceedings which did not meet the new procedural rules be expunged. *Wolff v. McDonnell, supra,* 418 U.S. at 573.

III

APPELLANT'S EQUAL PROTECTION CLAIMS SHOULD NOT BE REACHED BY THIS COURT BECAUSE THEY WERE NEITHER DECIDED NOR REACHED BELOW AND BECAUSE THE RECORD IS NOT SUFFICIENT FOR THE CLAIMS TO BE DECIDED BY THIS COURT

Appellant woud have this Court note probable jurisdiction to determine that the equal protection clause requires that the same due process should apply both to involuntary transfers of state prisoners to state mental hospitals and to involuntary civil commitments to state mental hospitals. Appellant urged equal protection claims in the trial court and in the Court of Appeal as an alternative theory to obtain a specification of minimum procedural safeguards at proceedings for interdepartmental transfers of state prisoners. However, neither the trial court nor the Court of Appeal reached or decided these claims.

Appellant would nevertheless have this Court litigate his equal protection claims in the first instance. Resolution of appellant's equal protection argument would seem to require a great deal more information respecting state statutes, regulations, decisional law, and practices than is available in the record in this appeal. Also necessary to such litigation would be evidence of the nature and weight of the involved public interests, and private interests.

We note that appellant's equal protection argument risks a result which may be anomalous. Thus, this Court having determined the specific minimum requirements of due process for involuntary transfers of state prisoners to a

state mental hospital, it would appear that appellant's view of the equal protection clause would be satisfied by abridging the procedural rights now typically afforded at civil commitment hearings to limit such hearings to *Vitek* procedures. To the extent such a result would be at risk in litigation of appellant's equal protection claims in this Court, it is clear that indispensable interests would not be able to appear as parties.

CONCLUSION

For the above reasons appellees respectfully urge this Court to dismiss the appeal or to summarily affirm the decision of the California Court of Appeal. If the appellant's jurisdictional statement be treated as a petition for writ of certiorari, appellees respectfully urge that it be denied.

Dated: May 12, 1980

Respectfully submitted,

GEORGE DEUKMEJIAN
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Attorneys for Appellees

(Appendices follow)

APPENDICES

Appendix A

In the Superior Court
of the
State of California
in and for the
County of Solano
Department No. 3

No. 67432

Canal Keyhea, et al.,
Plaintiffs,

vs.

J. J. Enomoto, et al.,
Defendants.

[Filed Oct. 13, 1978]

ORDER SUSTAINING DEMURRER

Defendants' demurrer was heard on February 17, 1978. Plaintiff appeared by Peter J. Sheehan. Deputy Attorney General Karl S. Mayer appeared for defendants. The last letter brief was filed on July 21, 1978.

The court has carefully read and considered the points and authorities presented by the parties. The court notes the complaint was filed on July 15, 1977. Plaintiffs were allowed to amend the complaint and later added an amendment to the amendment. The posture of the case as pointed out by defendants is that the complaint pleads a federal civil rights action, a taxpayer's action, a class action, mul-

tiple demands for declaratory and injunctive relief, including expungement of records, thirteen distinct state and federal constitutional provisions, four distinct state and federal statutes, a number of Department of Corrections, Community Release Board and Department of Health regulations to consider and an unnecessary large number of defendants. Defendants complain "though the action as framed may seem to be a law review editor's delight, it is a judge's and a litigant's nightmare".

Defendants' demurrer is contained in thirty-nine objections to five causes of action in the first amended complaint. Plaintiffs' answer to defendants' objections is contained in 64 pages of contrary reasoning. More briefs and differing contentions are stated back and forth in many more pages of memoranda.

The court has spent many, many hours in an attempt to reconcile the opposing points of view and finds and concludes for purposes of this demurrer as follows:

(1) The court has no jurisdiction of this action as it does not appear in the complaint that plaintiffs have exhausted their administrative remedies.

(2) The complaint does not allege sufficient facts to meet class action criteria.

(3) The complaint does not state sufficient facts to constitute a cause of action under 42 U.S.C. Section 1983.

(4) The complaint does not state facts alleging a proper state taxpayers' action under C.C.P. Section 526a.

For the reasons stated above, the court does not reach the remaining grounds of demurrer advanced by defendants. Accordingly,

IT IS HEREBY ORDERED that said demurrer be and the same is hereby sustained with thirty (30) days allowed to amend.

Dated: October 12th, 1978.

/s/ ELLIS R. RANDALL
Judge of the Superior Court

In the Superior Court
of the
State of California
in and for the
County of Solano

No. 67432

Canal Keyhea, et al.,
Plaintiffs,

vs.

J. J. Enomoto, et al.,
Defendants.

[Filed Nov. 28, 1978]

JUDGMENT OF DISMISSAL AFTER ORDER SUSTAINING DEMURRER

WHEREAS, defendants' demurrer to plaintiffs' First Amended Complaint and amendment thereto has been sustained and the time within which the Court granted leave to amend said complaint has expired and plaintiffs have failed to file any amended complaint; and

WHEREAS, said order sustaining the demurrer herein was rendered on October 12, 1978, and plaintiffs were served notice of said ruling on October 18, 1978; and application has been made to the Clerk of this Court for entry

of judgment in favor of defendants and against plaintiffs and good cause appearing therefor;

IT IS ORDERED, ADJUDGED, AND DECREED that this action be and the same hereby is, dismissed with prejudice; plaintiffs to take nothing by this action.

Dated: Nov. 27, 1978

ELLIS R. RANDALL
Judge of the Superior Court

Appendix B

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

1 Civil No. 45908
(Sup. Ct. No. 67432)

Canal Keyhea, et al.,
Plaintiffs and Appellants,

vs.

J. J. Enomoto, et al.,
Defendants and Respondents.

[Filed Dec. 21, 1979]

Canal Keyhea (Keyhea) filed a complaint in the Solano County Superior Court for declaratory and injunctive relief against J. J. Enomoto, Director of the Department of Corrections; T. L. Clannon, Superintendent of the California Medical Facility; Jerome Lackner, Director of the California Department of Mental Health; Sylvia Winters, Medical Director of Patton State Hospital; Howard Way, former Chairman of the California Adult Authority and present Chairman of the Community Release Board; their agents, employees, and successors in interest (respondents).

A first amended complaint was filed to include as plaintiffs Valamar A. Schaaf and Evelyn Schaaf, two state taxpayers, and to include a class action.

The first amended complaint seeks a declaratory judgment that Penal Code sections 2684 and 2685, which provide for the transfer and commitment of state prisoners to state mental hospitals and Department of Corrections Administrative Manual section 346.15, which provides for the involuntary administration of a psychotropic drug to state prisoners are unconstitutional; an injunction against expending public money and time in enforcing Administrative Manual section 346.15; an injunction against subjecting Keyhea and the class to the involuntary administration of drugs unless the following occurs: a compelling state interest is shown, there is no less onerous alternative and a mandatory hearing incorporating due process procedures is afforded prior to the drugging; an injunction requiring respondents to adhere to the provisions of Administrative Manual section 346.15; an injunction against transferring Keyhea and the class to a state mental hospital without procedural due process protections; an injunction against retention of Keyhea at Patton State Hospital; and an injunction requiring expungement from Keyhea's records any reference to his transfer.

The court filed an order sustaining respondents' demurrer with leave to amend on the following grounds: (1) the court has no jurisdiction as Keyhea has not exhausted his administrative remedies; (2) the complaint does not allege sufficient facts to meet class action criteria; (3) the complaint does not state sufficient facts to constitute a

cause of action under 42 United States Code, section 1983; (4) the complaint does not state facts alleging a proper state taxpayers' action under Code of Civil Procedure section 526a.

The trial court did not reach or rule upon the remaining grounds of demurrer advanced by appellants, including the ground that the first amended complaint did not allege facts sufficient to constitute a cause of action, and we do not rule on that ground at this time. Appellants failed to further amend their complaint. Judgment of dismissal was entered. The appeal is from the judgment.

Keyhea was a state prisoner confined at the Correctional Medical Facility at Vacaville until February 1977.[1] While at Vacaville, psychotropic drugs were administered to Keyhea without his consent.

On March 18, 1977, Keyhea was transferred from the Correctional Medical Facility operated by the Department of Corrections to Patton State Hospital, a hospital for mentally disordered individuals, operated by the Department of Health. Keyhea remained at Patton State Hospital until May 19, 1978, when he was released on parole. On July 19, 1979, Keyhea was returned to state prison for a 90-day psychiatric observation. The 90-day period has now

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[1]Since the trial court sustained respondents' demurrer we must accept the allegations of appellant's first amended complaint as true, determining whether such allegations state, or can be amended to state, a cause of action. (See Griffith v. Department of Public Works (1956) 141 Cal.App.2d 376, 379-380.)

expired. It also appears that his parole period has now expired and that he is entitled to discharge from custody.[2]

Appellants Valamar Schaaf and Evelyn Schaaf have alleged in the first amended complaint that section 346.15 of the California Department of Corrections Administrative Manual is unconstitutional, thus expenditure of funds pursuant to section 346.15 is illegal and wasteful.

Appellants Schaaf assert standing pursuant to Code of Civil Procedure section 526a, which provides that "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city, or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ."

The issue before us is whether Code of Civil Procedure section 526a applies to suits directed at state agencies and state officials despite its omission of any reference to such parties.

Appellants rely upon several cases which have held that a liberal interpretation of section 526a includes suits against state agencies and officials. (Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146; Serrano v. Priest (1971) 5 Cal.3d 584; Blair v. Pitchess (1971) 5 Cal.3d 258;

[2]The information relative to Keyhea's parole and discharge is supplied by the Attorney General and is not contradicted by appellants' counsel.

Marin Hospital Dist. v. Department of Health (1979) 92 Cal.App.3d 442; Los Altos Property Owners Assn. v. Hutcheon (1977) 69 Cal.App.3d 22; Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal.App.3d 769.)

Respondents contend that a major flaw appears in all of these cases in that each case has relied upon the holding in preceding cases and by so doing has perpetuated an erroneous interpretation of section 526a. In *Ahlgren v. Carr* (1962) 209 Cal.App.2d 248, the court discussed the *common law* right of a taxpayer to enjoin an unlawful expenditure of state funds. The discussion made no reference to Code of Civil Procedure section 526a. Under common law authority, "a taxpayer may sue a governmental body in a representative capacity in cases involving fraud, collusion, ultra vires, or failure on the part of the governmental body to perform a duty specifically enjoined." (Gogerty v. Coachella Valley Junior College Dist. (1962) 57 Cal.2d 727, 730.) Relying upon *Gogerty*, which found that the common law theory was not limited to municipalities, but applied to all governmental bodies, the court in *Ahlgren* held that a taxpayer has the right to maintain an action against state officers and agencies. (Ahlgren v. Carr, *supra*, 209 Cal.App.2d 248 at p. 254.) In *California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, the court cited *Ahlgren v. Carr*, as authority for holding that the taxpayer/plaintiff had a common law right to bring an action against the state.

The defective interpretation of section 526a, according to respondents, began with *Blair v. Pitchess, supra*, 5 Cal. 3d 258, which relied upon *Ahlgren v. Carr* and *California*

State Employees' Assn. v. Williams, supra, as support for its statement that "it has been held that taxpayers may sue *state* officials to enjoin such officials from illegally expending state funds [under Code of Civil Procedure section 526a"] (emphasis in original) (Blair v. Pitchess, *supra,* 5 Cal.3d 258 at p. 268). Obviously, the court erred in relying upon either case as authority for the right of taxpayers to sue state officials under section 526a when both cases dealt solely with the common law theory and not with the statutory rule. With its genesis in *Blair v. Pitchess,* the erroneous interpretation continued. In *Serrano v. Priest, supra,* 5 Cal.3d 584, the court stated in a footnote that "it has been held that state officers too may be sued under section 526a. (Blair v. Pitchess, *ante,* p. 258, at p. 267; California State Employees' Assn. v. Williams (1970) 7 Cal.App.3d 390, 395 [86 Cal.Rptr. 305]; Ahlgren v. Carr (1962) 209 Cal.App.2d 248, 252-254 [25 Cal. Rptr. 887])." (*Id.,* at p. 618, fn. 38.) *Blair* was again cited in *Adams v. Department of Motor Vehicles, supra,* 11 Cal. 3d 146, 151 and *Duskin v. San Francisco Redevelopment Agency, supra,* 31 Cal.App.3d 769, 773, for authority that state officials may be sued under section 526a.

Respondents further claim that the Court of Appeal cases have utilized the liberal, albeit erroneous, interpretation of section 526a to extend coverage of section 526a to school districts (Los Altos Property Owners Assn. v. Hutcheon, *supra,* 69 Cal.App.3d 22, 26-30) and to hospital districts (Marin Hospital Dist. v. Department of Health, *supra,* 92 Cal.App.3d 442 at p. 450).

Respondents further contend that it is clear from a study of the cases that the Supreme Court's erroneous holding in *Blair v. Pitchess* has been repeated.[3] Section 526a states that only certain governmental bodies are subject to a taxpayer's suit. The State of California is clearly omitted from the section and it does not appear that such omission was an oversight on the part of the Legislature. Section 526a was adopted in 1909 (ch. 348, § 1, p. 578), amended in 1911 (ch. 71, § 1, p. 87), and 1967 (ch. 706, § 1, p. 2080). Had the Legislature intended to extend coverage to the State of California, then surely the omission would have been corrected by now. This court is bound by the clear wording of the statute and may not provide additional words to alter its purpose. (People v. Knowles (1950) 35 Cal.2d 175, 183.)

Nevertheless, our Supreme Court in *Serrano v. Priest, supra,* 5 Cal.3d 584 at page 618, footnote 38, stated: "It has been held that state officers too may be sued under section 526a," and again in *Stanton v. Mott* (1976) 17 Cal. 3d 206, 223, the court cited section 526a as authority for a taxpayer to sue a state officer. In addition, there is another authority which gives a taxpayer the right to sue state agencies and state officials; the common law. The common law theory, however, is limited to certain grounds for bringing suit against the state: "fraud, collusion, ultra vires, or a failure . . . to perform a duty specifically enjoined" (Silver v. City of Los Angeles (1961) 57 Cal.2d 39, 40-41).

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[3]The court in *Los Altos Property Owners Assn. v. Hutcheon, supra,* 69 Cal.App.3d 22, noted that the *Ahlgren* case did not make any reference to section 526a. (*Id.,* at p. 27, fn. 6.)

In order for appellants Schaaf to assert standing under the common law rule, their allegation of wrongdoing must fall within one of the classifications specified in *Silver*. Appellants Schaaf contend that respondent California Department of Corrections unlawfully expended funds pursuant to an allegedly unconstitutional section in the department's Administrative Manual. The court in *Ahlgren v. Carr, supra,* 209 Cal.App.2d 248, found that, under the common law rule, plaintiff taxpayers have a right to sue state officials for illegally expending public funds. Although the court did not specify which *Silver* classification such action comes within, by deductive reasoning it is clear that the illegal expenditure was an ultra vires act of the governmental body. There were no facts in *Ahlgren* to support the remaining three classifications: fraud, collusion nor failure of the state to perform a duty enjoined. The court in *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, specifically held that an illegal expenditure of public funds is an ultra vires act. (*Id.*, at pp. 504-505.)

Thus, appellants, as taxpayers, have standing to bring an action against state officers and the trial court erred in sustaining the demurrer on this ground.

II

The trial court held "The court has no jurisdiction of this action as it does not appear in the complaint that plaintiffs have exhausted their administrative remedies." Generally, where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will

act. (See Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280.)

Appellant Keyhea, however, contends that under the circumstances of this case, exhaustion of remedies would be futile. His argument is based upon the premise that raising a constitutional challenge to a state statute before an administrative agency which does not have the power to declare the statute unconstitutional would be a futile act.

There has been a consensus in California courts that exhaustion of remedies is a prerequisite to judicial relief even where the statute to be applied is challenged on constitutional grounds. (United States v. Superior Court (1941) 19 Cal.2d 189, 195; Morton v. Superior Court (1970) 9 Cal.App.3d 977; Walker v. Munro (1960) 178 Cal.App.2d 67.) *Walker v. Munro* has been criticized and disapproved in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251, where the Supreme Court allowed the petitioner to challenge the constitutionality of the Coastal Zone Conservation Act in court without first raising the issue before the Coastal Zone Conservation Commission. The court noted that "since an administrative agency is not the appropriate forum in which to challenge the constitutionality of the basic statute under which it operates, there seems little reason to require a litigant to raise the constitutional issue in proceedings before the agency as a condition of raising that issue in the courts." (*Id.*, at p. 251.)

However, in a later case, *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, the Supreme Court held that the Public Utilities Commission

may declare a duly enacted statute unconstitutional. The court noted that the Constitution and statutes of this state grant the commission wide administrative, legislative and judicial powers. (*Id.*, at p. 311, fn. 2.)

It is unclear, as pointed out in *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, how *Southern Pac. Transportation Co.* can be reconciled with *State of California v. Superior Court*. The court in *Hand* concluded that the most reasonable manner in which these two cases can be harmonized is to construe *Southern Pac. Transportation Co.* as allowing only those administrative agencies which are of constitutional origin to determine constitutional challenges to statutes enacted by the Legislature. (*Id.*, at p. 619.)

It has not yet been determined by an appellate court whether the Department of Corrections is an agency of constitutional origin. Although the Department of Corrections was not specifically created by the Constitution, it was created by the Legislature in the exercise of a delegation conferred on it by an express provision of the Constitution. The question, however, of whether agencies of constitutional origin or legislative origin have the power to declare statutes unconstitutional is no longer material. In 1978, article III, section 3.5 of the California Constitution, was amended to provide that administrative agencies are without power to determine constitutional challenges to legislative enactments. It specifically states that:

> "Sec. 3.5. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

On the basis of this constitutional amendment alone, we must conclude that the Department of Corrections, be it an agency of constitutional origin or legislative origin, may not decide the constitutional challenges raised by Keyhea. Since the only issues appellant Keyhea raises are of a constitutional nature, he is exempt from exhausting his administrative remedies before seeking judicial relief. (Hand v. Board of Examiners, *supra*, 66 Cal.App.3d 605, at p. 619.) Thus, the court erred in concluding that appellant Keyhea had a duty to exhaust, but failed to exhaust, his administrative remedies.

III

Appellant Keyhea alleges that he represents an ascertainable class.

Code of Civil Procedure section 382 provides that "when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The requirements for sustaining a class action are clear: (1) there must be an ascertainable class and (2) there must be a well defined community of

interest in the questions of law and fact involved affecting the parties to be represented. (Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 704.)

The first requisite for maintenance of a class action, ascertainability of the class, presents a serious obstacle in the case at bench. The number of members is indefinite and although we do not require the identity of the individual members of the class, it is a prerequisite to establish the existence of an ascertainable class. It is not possible to ascertain what persons will be incarcerated in the future in a state prison and subject to the provisions of Administrative Manual section 346.15 and Penal Code sections 2684 and 2685. In *Alvarez v. Wiley* (1977) 71 Cal. App.3d 599, the court held that a class action could not be sustained where the complaint alleges that members of the class consist of future heroin addicts confined in the Tulare County Jail. (*Id.*, at p. 602.)

In *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, the court found that including as members of the class all persons who will suffer in the future convictions under Vehicle Code section 23102, subdivision (a), would result in an incognizable and unmanageable class of plaintiffs. (*Id.*, at p. 629.)

It does not appear from the record that appellant Keyhea is now a member of the interested class he claims to represent, a requisite element to the maintenance of a class action. (LaSala v. American Sav. & Loan Assn. (1971) 5 Cal.3d 864, 875 and all cases cited at p. 875, fn. 7.) There is no community of interest between appellant Keyhea and the other members of the class for they are

not similarly situated since Keyhea is no long incarcerated in the state prison nor subject to Administrative Manual section 346.15 and to Penal Code sections 2684 and 2685.

At the time of filing his complaint on July 15, 1977, appellant Keyhea was confined at Patton State Hospital. He was, however, released on parole on May 19, 1978, approximately five months before the court filed an order sustaining the demurrer to the first amended complaint. He was subsequently returned to prison for 90 days but that period has now expired. Also, it appears that Keyhea's parole period has now expired and that he is entitled to or has been discharged from custody.

In support of his contention that he continues to represent the class despite his present status, appellant Keyhea cites us to *Geraghty v. United States Parole Commission* (1978) 579 F.2d 238. In that case, it is held that once a *class action is certified,* the mooting of a claim set forth by the named plaintiff does not automatically deprive a court of jurisdiction over the cause of action asserted by the class. (*Id.*, at p. 248.) Keyhea's suit, however, was not properly certified as a class action *before* he was released on parole, thus it is not jurisdictionally appropriate to continue to entertain the suit. (See Geraghty v. United States Parole Commission, *supra,* 579 F.2d 238.)

IV

It is unnecessary to determine whether appellants' contentions state sufficient facts to constitute a cause of action under 42 United States Code, section 1983, since the action has become moot due to Keyhea's discharge

from custody. Although the trial court did not consider the issue of mootness raised in the demurrer, it is our prerogative to determine whether the action is moot. If any of the grounds raised in the demurrer are sustainable, we must affirm the trial court's ruling. (Gonzales v. State of California, *supra,* 68 Cal.App.3d 621 at p. 627.)

At the time Keyhea filed the first amended complaint, he was confined in Patton State Hospital. However, he was released on parole before the trial court issued its order sustaining the demurrer.

"[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." (Wilson v. L. A. County Civil Service Com. (1952) 112 Cal.App.2d 450, 453.)

Here, we have no actual controversy as to Keyhea. He is no longer subjected to Penal Code sections 2684 and 2685 and Administrative Manual section 346.15. Any rights Keyhea may have had pursuant to those provisions do not presently exist.

Appellant Keyhea relies upon three federal cases to support his proposition that an inmate's release on parole does not render the action moot. (Evans v. Paderick (1977) 443 F.Supp. 583; Souder v. McGuire (1976) 423 F.Supp. 830; Fhagen v. Miller (1969) 306 F.Supp. 634.) Although all three inmates challenged the constitutionality of the procedures authorizing commitment to a state mental hospital, none of the inmates had been released

on parole. Each inmate had been returned to prison at the time of the judicial determination of the issues. Yet, the courts found that the actions were not moot, especially in light of each inmate's history of prior commitments to the state mental hospital.

The possibility of future commitments of Keyhea appears remote and speculative. At the present time there are no facts to support the contention that Keyhea, now discharged, will be recommitted. Due to the absence of a justiciable controversy, this court is unable to render an effective decree responsive to appellants' complaint.

The judgment of dismissal is affirmed as to Canal Keyhea, individually and on behalf of all others similarly situated. The judgment is reversed as to Valamar A. Schaaf and Evelyn Schaaf and the cause is remanded to the trial court for further proceedings consistent with this opinion. Appellants Valamar A. Schaaf and Evelyn Schaaf to recover their costs on appeal. The other parties to bear their own costs on appeal.

Caldecott, P. J.

We concur:

Rattigan, J.

Christian, J.

Court of Appeal of the State of California

First Appellate District

Division Four

1 Civ. No. 45908
Superior Court No. 67432

Canal Keyhea, et al.,
Plaintiffs and Appellants,

vs.

J. J. Enomoto, et al.,
Defendants and Respondents.

[Filed Jan. 18, 1980]

ORDER MODIFYING OPINION
AND DENYING REHEARING.

BY THE COURT:

It is ordered that the opinion filed herein on December 21, 1979, be modified in the following particulars:

On page 1, line 1 should be changed to read as follows:

Canal Keyhea (Keyhea) filed a complaint on behalf of himself and all others similarly situated in the [the sentence then continues as is with no other changes].

On page 1, line 12 should end with a period after the word taxpayers; line 13 should be deleted.

On page 3, line 15 (beginning of the third full paragraph), the date March 18, should be changed to February 3.

On page 16, a new paragraph should begin after line 16, which will read:

Appellant's request to take judicial notice is granted.

The petitions for rehearing are denied.

Dated Jan. 18, 1980

CALDECOTT, P.J.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Feb. 27, 1980

I have this day filed Order

_____

_____

_____

HEARING DENIED

_____

_____

_____

In re: 1 Civ. No. 45908

Keyhea et al.

vs.

J. J. Enomoto, et al.

Respectfully,

G. E. BISHEL
Clerk

68378-877 2-79 4M OSP

1 Civil No. 45908

In the Court of Appeal
of the
State of California

First Appellate District

Division Four

Canal Keyhea,
Appellant,

vs.

J. J. Enomoto, et al.,
Appellees.

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Canal Keyhea, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, affirming the dismissal of the complaint as to Canal Keyhea, entered in this action on March 4, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: March 6, 1980

/s/ PETER E. SHEEHAN
PETER E. SHEEHAN
Counsel for Appellant

[Proof of Service Omitted]

Appendix C

In the Superior Court
of the
State of California
in and for the County of Solano
Department No. 3

No. 67432

Canal Keyhea, individually and on behalf of all others similarly situated, Valamar A. Schaaf, and Evelyn Schaaf,
Plaintiffs,

vs.

J. J. Enomoto, individually and in his official capacity as Director of the Department of Corrections for the State of California: T. L. Clanon, individually, et al.,
Defendants.

[Filed April 25, 1980]

ORDER OVERRULING DEFENDANTS' DEMURRER TO COUNTS ONE AND FIVE OF THE COMPLAINT

The above-entitled proceeding came on regularly for hearing on February 17, 1978, on the defendants' demurrer; plaintiffs being represented by PETER E. SHEEHAN and defendants being represented by KARL S. MAYER, Deputy Attorney General.

FACTS

The Court of Appeal having affirmed the judgment of dismissal as to complainant, CANAL KEYHEA, individually, and on behalf of all others similarly situated. There remains for decision the Attorney General's demurrer to Counts One and Five of the complaint, wherein complainants, VALAMAR A. SCHAAF and EVELYN SCHAAF seek injunctive and declaratory relief as taxpayers of the State of California, under their common law right to sue state agencies and state officials for illegal expenditures of public funds.

The issues left unresolved by the decision of the Court of Appeal consist of four asserted grounds for dismissal:

(1) As to both counts, the Attorney General asserts that the complaint and allegations thereunder are "uncertain";

(2) As to Count One, it is claimed that the Court lacks power to enjoin the exercise of a public office, in a lawful manner, by the person in possession;

(3) As to Count One, the Attorney General points out that the complaint first recites that Administrative Manual Section 346.15 is followed in all cases, then requests that an injunction issue compelling defendants to adhere to the provision of that same section;

(4) As to Count Five, the Attorney General asserts that the Administrative actions challenged therein are not a proper subject for declaratory relief.

ANALYSIS

The Attorney General fails to specify what is uncertain about the complaint and the allegations thereunder with respect to Counts One and Five. The Court, therefore, finds that said complaint is certain, and overrules the demurrer on this ground.

Similarly, the Attorney General fails to explain his assertion that a public office is being exercised "in a lawful manner", in view of the complaint's claim that the statutes and administrative regulations under which the office is exercised are unconstitutional and hence unlawful. The demurrer is overruled on this ground as well.

The Attorney General correctly points out an anomaly in the complaint where it is asserted that Administrative Manual Section 346.15 is followed in all cases, and then seeks an order to compel adherence to its provisions. This unusual allegation presents no basis for injunctive or declaratory relief. However, the claim is harmless and the demurrer is overruled.

With respect to the asserted impropriety of the declaratory relief sought by Count five of the complaint, *State of California v. Superior Court* (1974) 12 C.3d 237 reveals that such relief is available where the constitutionality of a rule is challenged, but is not available where particular application of the rule to the complainant is challenged. (Id. at 251). In the present case, the taxpayer-complainants assert that Administrative Manual Section 346.15 is unconstitutional and that all actions taken by defendants under

its aegis are unlawful. They are clearly *not* seeking review of a particular administrative decision, and thus, are not confined to the provisions of Code of Civil Procedure, Section 1094.5. The demurrer must therefore be overruled on this final ground.

All other grounds of demurrer have been considered and the same are hereby overruled. Defendants shall be allowed thirty (30) days to answer.

DATED: April 24, 1980.

ELLIS R. RANDALL

Judge of the Superior Court

Supreme Court, U. S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1597

In the Supreme Court of the United States

October Term, 1979

CANAL KEYHEA,

Appellant,

vs.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.

Appellees.

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

On Appeal from the Court of Appeal for the State of California, First Appellate District

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No. 79-1597

In the Supreme Court of the United States

October Term, 1979

CANAL KEYHEA,

Appellant,

vs.

J. J. ENOMOTO, Director of the Department of Corrections for the State of California, et al.,

Appellees.

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

On Appeal from the Court of Appeal for the State of California, First Appellate District

Appellees' motion to dismiss or affirm neither defends the California Court of Appeal's holding that this action was moot nor explains that court's *sub silentio* rejection of the well established principles set forth in *Sibron* v. *New York*, 392 U.S. 40 (1968) and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Rather, appellees' principal argument is that appellant is not entitled to either declaratory relief or relief in the form of expungement because the decision in *Vitek* v. *Jones*,

.... U.S. ...., 100 St. Ct. 1254 (1980) should be given solely prospective application (Motion to Dismiss or Affirm 10-11). Appellees are incorrect for two reasons. First, the question of the "retroactivity" of the *Vitek* decision is not even presented because *Vitek* did not represent a sharp departure from prior law. Second, even assuming that the retroactivity question was presented, *Vitek* is fully retroactive.

I.

THE QUESTION OF PROSPECTIVE APPLICATION OF VITEK IS NOT PRESENTED BECAUSE VITEK DID NOT CONSTITUTE A SHARP BREAK IN THE WEB OF THE LAW.

The question of prospective application of a decision of this Court is not even presented unless the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971) (citations deleted). See cases summarized in *United States* v. *Peltier*, 422 U.S. 531, 544, n. 1 (1975) (Brennan, J., dissenting). Tested against this standard, the *Vitek* decision does not present a question of prospectivity. *Vitek* not only failed to overrule existing precedent but it was clearly foreshadowed, if not preordained, by previous decisions of this Court. *Vitek* simply applied familiar principles of constitutional law established in *Morrissey*, *Wolff*, and *Meachum*[1]—all of which

[1] *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Meachum* v. *Fano*, 427 U.S. 215 (1976).

were decided more than a year before appellant's transfer in 1977. In ruling that due process was applicable to statutes authorizing the transfer of mentally ill prisoners to mental institutions this Court specifically noted that it had "repeatedly held that state statutes may create liberty interests," relied for its holding upon existing authority decided from one to five years prior to appellant Keyhea's transfer, and described the lower court's conclusion as "unexceptional" in light of this Court's previous decisions (*Vitek*, *supra*, 100 S.Ct. at 1261, 1262). Indeed, given *Wolff* and *Meachum* and the fact that prisoners could be transferred only if they were, *inter alia*, mentally ill, it was ineludible that "the predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff*" (*Meachum*, *supra*, 427 U.S. at 226-227) would also be found in *Vitek*. *Morrissey*, and perhaps to a lesser extent *Wolff*, can be reasonably viewed as constituting "a sharp break in the line of earlier authority [and] an avulsive change which caused the current of the law thereafter to flow between new banks." (*Hanover Shoe* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 499 1968.) However, for precisely this reason *Vitek* must be seen as simply adhering to the current previously established by *Morrissey* and *Wolff*.

Moreover, not only was *Vitek* clearly foreshadowed by decisions of this Court but in addition by a trend of lower court decisions and commentators. Prior to *Vitek* no less than nine courts, including the District

of Columbia Circuit and Second Circuit, had voided prison-mental hospital transfer statutes similar to the statute at issue in *Vitek*.[2] The Third Circuit had strongly questioned the validity of such statutes and the commentators had uniformly concluded they were invalid on the basis of *Wolff* and *Meachum*.[3] While the Ninth Circuit in a short per curiam decision in 1965 upheld §2684 against a due process challenge (*Darey* v. *Sandritter*, 355 F.2d 22 (9th Cir. 1965)), any comfort appellees might have received from the conclusory *Darey* opinion should have been short-lived. The premise of *Darey*—that a prisoner's involuntary commitment to a mental institution is within the range of conditions of imprisonment—was rejected by this Court in several decisions rendered between 1966 and 1972 (see *Vitek*, *supra*, 100 S.Ct. at 1264). Moreover, numerous decisions recognizing that statutes could create interests entitled to due process protections were decided subsequent to *Darey*. See, e.g., *Wolff*, *supra*; *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). These decisions were inconsistent with *Darey* and clearly demonstrate that it was unwarranted to rely on *Darey* as

[2] *Matthews* v. *Hardy*, 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); *United States ex rel Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir. 1969), *cert. denied*, 396 U.S. 847 (1969); *Harmon* v. *McNutt*, 587 P.2d 537, 539 (Wash. Supreme Ct. 1978); *Chesney* v. *Adams*, 377 F.Supp. 887 (D.Conn. 1974), *aff'd without opinion*, 508 F.2d 836 (2d Cir. 1975); *United States ex rel. Souder* v. *Watson*, 413 F.Supp. 711 (M.D.Penn. 1976); *Sites* v. *McKenzie*, 423 F.Supp. 1190 (N.D.W.Va. 1976); *Evan* v. *Paderick*, 443 F.Supp. 583 (E.D.Va. 1977); *Migone* v. *Vincent*, 411 F.Supp. 1386 (S.D.N.Y. 1976); *Watson* v. *Whyte*, 245 S.E.2d 916 (W.Va. 1978).

[3] *Souder* v. *McGuire*, 516 F.2d 820 (3rd Cir. 1975); Alexander, *The New Prison Administrators and the Court: New Directions in Prison Law*, 56 Tex.L.Rev. 963, 984-985 (1978); Comment, *Transfer of Prisoners to Mental Institutions*, 69 Journal of Criminal Law and Criminology 337, 339-344 (1978).

a definitive pronouncement that §2684 was constitutionally valid. Compare *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968) (reliance on previous decision of *this* Court not justified when decision had "been under attack from its inception and many courts have, in fact, rejected it.") *Dasho* v. *Susquehanna Corporation*, 461 F.2d 11, 21 (7th Cir. 1972) (Stevens, J.) (resolution of conflict in circuits does not establish a new principle of law.)

II.

IF THE QUESTION IS PRESENTED, VITEK SHOULD BE GIVEN FULL RETROACTIVE EFFECT.

Even on the erroneous premise that the retroactivity of *Vitek* is here involved, appellees are incorrect in asserting that it must be given prospective effect only. First, the major purpose of the constitutional protections reaffirmed in *Vitek* would be furthered by retroactivity because those safeguards were designed to protect against what this Court described as "the inherent risk of a mistaken transfer" to a mental institution, especially given "the subtleties and nuances of psychiatric diagnoses." *Vitek*, *supra*, 100 S.Ct. at 1265. Indeed, Justice Powell in his concurring opinion specifically noted that "[i]t is unlikely that an inmate threatened with involuntary transfer to mental hospitals will possess the competence or training to protect adequately his own interest in these state-initiated proceedings." *Vitek*, *supra*, 100 S.Ct. at 1266 (Powell, J., concurring.)

Second, the burden resulting from holding *Vitek* retroactive is significantly less than that identified in *Wolff* or *Morrissey*. *Wolff* involved 19,000 and *Morrissey* 1,100 hearings per year on the federal level alone, while the California Department of Corrections estimated that 3,000 disciplinary hearings were held in a two-month period.[4] In contrast, appellants' motion estimates that 20 prisoners are transferred to mental institutions in a two-month period (Motion to Dismiss or Affirm, p. 11). And any "burden" imposed by retroactivity would be limited to those states which have continued to summarily commit prisoners despite holdings of numerous courts to the contrary (see n. 2, *supra*).

Finally, it would be exceedingly harsh and inequitable to limit *Vitek* to prospective application. Such a limitation would effectively foreclose the ability of prisoners who have been summarily committed "to live in the grievously distressing atmosphere of an institution . . . which houses the insane" (*Liles* v. *Ward*, 424 F.Supp. 675, 678 (S.D.N.Y. 1976)) to contest their commitment despite "the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all." (*Matthews* v. *Hardy*, 420 F.2d 607, 610 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).)

[4] *Fitzgerald* v. *Procunier*, 393 F.Supp. 335, 339, n. 1 (N.D.Cal. 1975).

For the reasons discussed above, the judgment of the Court of Appeal of California should be reversed by this Court.

Dated: May 22, 1980.

Respectfully submitted,

PETER E. SHEEHAN
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Attorneys for Appellant